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it is gratifying to note that the opinion expressed in a recent New York case is contrary in effect to the earlier decision. *Kolb v. National Surety Co.*, 176 N. Y. 233. This latest conclusion is sound in theory, and it avoids the unfortunate result of allowing the creditor, at his caprice, to throw the burden of the obligation on an innocent party.

RECENT CASES.

ACCORD AND SATISFACTION — ACCEPTANCE OF PART PAYMENT STIPULATED TO BE PAYMENT IN FULL. — The defendant sent the plaintiff a check in payment of an unliquidated debt, saying, "I think this pays you well for what you have done for me. You insisted on my fixing the price." The plaintiff retained the check, and wrote the defendant that he applied it on account and did not take the amount in full settlement. *Held*, that the acceptance of the check does not constitute an accord and satisfaction. *Mack v. Miller*, 84 N. Y. Supp. 440.

The defendant sent checks as monthly payments on a contract, stating that they were to be in full of account. The plaintiff, who had previously declared that if sums of the amount sent were paid they could only be placed on account, retained the checks, making a protest the first month only. *Held*, that the facts show an accord and satisfaction. *Laroe v. Sugar Loaf Dairy Co.*, 84 N. Y. Supp. 609.

The defendant's agent tendered to the plaintiffs a certain amount in full settlement of a disputed claim. The plaintiffs accepted the sum tendered and signed a receipt in full, but stated to the defendant's agent at the time that they did not waive their right to the balance. *Held*, that there is an accord and satisfaction. *Cooper & Rock v. Yazoo, etc.*, R. R. Co., 35 So. Rep. 162 (Miss.). See NOTES, p. 272.

ADMIRALTY — HARTER ACT — WHAT CONSTITUTES "ERROR IN MANAGEMENT." By § 1 of the Harter Act (U. S. Comp. St. 1901, p. 2946) a vessel is responsible for damages arising from negligence in loading, care, "or delivery" of property committed to its charge. By § 3 the vessel is relieved from responsibility for damages "resulting from faults or errors in navigation or in the management of said vessel." A vessel reached port in winter with some two hundred tons of ice on deck. Through the negligent discharge of part of the cargo she became top-heavy, rolled over, and sank at the dock. *Held*, that the vessel is responsible for damages to the cargo still on board. *The Germanic*, 124 Fed. Rep. 1 (C. C. A., Second Circ.).

The property damaged was not that part of the cargo already unloaded, but the part of which the delivery was not yet begun. There could, therefore, be no negligence in its "delivery." The facts seem rather to bring the case under the third section, which exempts the vessel from liability. The "management" of a vessel includes the control of everything with which the vessel is equipped for the purpose of protecting her and her cargo against inroads of the sea. *The Silvia*, 171 U. S. 462. In a real sense the cargo itself serves this purpose, acting as the ballast which is necessary to the vessel's safety. Negligence in the handling of the cargo, therefore, might well be regarded as an "error in management." It is immaterial that the error was committed while the vessel was in port. *The Glenochil*, [1896] P. D. 10; cf. *Rowson v. Atlantic Transport Co.*, [1903] 1 K. B. 114.

ADMIRALTY — IMMUNITY OF GOVERNMENT VESSELS FROM ARREST. — A steam ferry-boat, built for the Crown, to be used in the operation of a railway managed by the government of the Dominion of Canada, was disabled on the high seas and towed into port. She was at the time in the course of being delivered by the builders and was the property of the Government. *Held*, that the vessel may not be libeled for salvage. *Young v. Steamship Scotia*, 89 L. T. 374 (Eng., P. C.). See NOTES, p. 270.

ADVERSE POSSESSION — CONTINUITY OF ADVERSE POSSESSION — TACKING. — A man held land adversely for fifteen years and died. His widow continued to occupy until her death many years later. The plaintiff claims through the heirs of the husband against the defendant in possession, who claims by deed from the widow. The court instructed that the plaintiff could tack the two possessions in order to satisfy the

twenty years statute of limitations and thus prove title in himself. *Held*, that the instruction is correct. *Atwell v. Shook*, 45 S. E. Rep. 777 (N. C.).

This case, although granting that by the law of the jurisdiction a certain privity of claim is necessary for tacking, refuses to follow the weight of authority, which holds that the privity between a deceased husband and a widow is insufficient. Most courts argue that since the widow has no right in the land before dower is assigned, her entry is a new disseisin. *Sawyer v. Kendall*, 10 Cush. (Mass.) 241. It is hard to reconcile this position, however, with the many authorities holding that in the absence of distinct notice of an adverse claim the widow does not hold in opposition to the heirs. *Cook v. Nicholas*, 2 Watts & S. (Pa.) 27. Under these decisions she is to be regarded as claiming, not as a disseisor, but under the heirs. Such is her actual intent in most cases. The widow's holding, if under the heirs, could be tacked, as the privity between heir and ancestor is sufficient. *Alexander v. Gibbon*, 113 N. C. 796. The principal case, therefore, in view of the true nature of the widow's holding, rightly allows her possession to be tacked to her husband's.

BANKRUPTCY — EXEMPTIONS — INSURANCE POLICY. — A bankrupt owned a life insurance policy exempt under state laws from the claims of creditors. *Held*, that it is therefore exempt under the national Bankruptcy Act. *Pulsifer v. Hussey*, 97 Me. 434. For a discussion of the point involved, see 14 HARV. L. REV. 618.

BANKRUPTCY — PREFERENCES — FRAUDULENT CONVEYANCES. — A person against whom a petition in bankruptcy was filed had within four months conveyed property to one of his creditors, with the secret purpose to defraud the rest of his creditors. The creditor had no reason to suspect the fraudulent purpose. *Held*, that the conveyance is voidable by the trustee in bankruptcy. *Sherman v. Luckhardt*, 74 Pac. Rep. 277 (Kan.).

The transfer in the principal case clearly gave the defendant a preference. Under the Bankruptcy Act of 1898, §§ 57a, 60g, preferences are voidable only when the grantee had reasonable cause to believe that the debtor was insolvent. The transfer, then, cannot be impeached under these sections. The court however holds that the transfer is bad under § 67 e, which provides that all conveyances by a bankrupt within four months of bankruptcy with intent to defraud his creditors, are bad except as to purchasers in good faith for a present fair consideration. This provision is almost identical with that of Stat. 13 Eliz. c. 5, in regard to fraudulent conveyances, which is held not to apply to preferences. *Twyne's Case*, 3 Coke 80 b. It seems probable that the meaning of this provision in the Bankruptcy Act is the same, since otherwise all the provisions in regard to preferences would be rendered entirely nugatory, and a preference of any sort would be voidable. Two recent cases which reach a result contrary to the principal case seem to express the more logical view. *Congleton v. Schreierhofer*, 54 Atl. Rep. 144 (N. J.); *Gamble v. Elkin*, 54 Atl. Rep. 782 (Pa.).

CHECKS — ACTION BY HOLDER AGAINST DRAWEE OF UNACCEPTED CHECK. — *Held*, that the holder of an unaccepted check may bring suit thereon against the bank on which it is drawn. *Bloom v. Winthrop State Bank*, 96 N. W. Rep. 733 (Ia.).

It is well established that the relation between a bank and a depositor is that of debtor and creditor. *Bank of Republic v. Millard*, 10 Wall. (U. S.) 152. There being no privity of contract between the holder of the check and the bank, the holder cannot sue the bank unless on the theory of an assignment by the drawer of his claim. It is settled that an ordinary check cannot operate as an assignment at law. *Attorney-General v. Continental Life Ins. Co.*, 71 N. Y. 325. A few states, however, consider it an equitable assignment. *Union Nat. Bank v. Oceana County Bank*, 80 Ill. 212. Iowa has been thought not to be one of these states. **ZANE ON BANKS AND BANKING**, § 147. The present case seems to settle the Iowa law to the contrary. The equitable assignment theory is open to the objection that it is not consistent with negotiability. An instrument containing an order to pay out of a particular fund is not negotiable. *Josselyn v. Lacier*, 10 Mod. Rep. *294. It is hard to see how a check can be an assignment of the fund out of which, if it is to be negotiable, it must not be made payable. Furthermore, the great weight of authority is against the view that a check is an equitable assignment. *Dickinson v. Coates*, 79 Mo. 250.

CONSIDERATION — VOLUNTARY PROMISES ACTED UPON. — The defendant company subscribed to a certain fund which was to be used by the plaintiff in preventing frauds connected with the trade in which the defendant was engaged. After the plaintiff had spent certain sums in pursuance of this plan, the defendant refused to pay its subscription. *Held*, that the defendant is liable. *Heinrich v. Missouri & Illinois Coal Co.*, 76 S. W. Rep. 674 (Mo., Ct. App.).

The case proceeds upon the ground that although the defendant's promise was voluntary, yet when it was acted upon by the plaintiff he was entitled to enforce the promise in order to reimburse himself. This accords with the weight of authority in the United States. *Homes v. Dana*, 12 Mass. 190; *Pitt v. Gentle*, 49 Mo. 74. Upon theory, however, it is difficult to find any consideration for the defendant's promise. An act is not consideration merely because it is done on the faith of a promise, but only when it is done in return for the promise, the act done being actually bargained for. *In re Hudson*, 54 L. J. Ch. 811. In the present case no intent to make a bargain appears. The breaking of subscription promises may undoubtedly cause great hardship, but it does not satisfactorily dispose of the difficulty to hold them binding through the invention of consideration which does not in fact exist. It is preferable to hold with the New York decisions that voluntary subscriptions cannot be enforced. *Presbyterian Church v. Cooper*, 112 N. Y. 517; *In re Hudson*, *supra*.

CONSTITUTIONAL LAW — IMPAIRMENT OF OBLIGATION OF CONTRACT — COMPETITION BY CITY WITH HOLDER OF FRANCHISE. — A state statute authorized cities to erect electric lighting plants, with a proviso that the right might be delegated. The plaintiff company was chartered by a city to erect and maintain such a plant for twenty years. Before the expiration of this time the city council voted to erect a municipal plant, to be maintained in competition with the plaintiff's. *Held*, that this is not an act under state authority impairing the obligation of contract. *City of Joplin v. Southwest Mo. Light Co.*, 24 Sup. Ct. Rep. 43.

This holding reverses the decision in the circuit court, which was discussed in 16 HARV. L. REV. 68.

CONSTITUTIONAL LAW — INTERNAL REVENUE — STAMP TAX ON SHIP'S MANIFESTS. — Under the War Revenue Act of June 13, 1898, a graduated stamp tax is laid on manifests of the cargoes of foreign-bound vessels. *Held*, that the tax is in violation of the constitutional prohibition of taxes or duties on articles exported from any state, and is void. *New York, etc., Co. v. United States*, 125 Fed. Rep. 320 (Dist. Ct., S. D. N. Y.).

Since the power to regulate foreign commerce includes the right to tax, Congress may lay tonnage duties on foreign-bound vessels. *Aguirre v. Maxwell*, 3 Blatchf. (U. S. C. C.) 140. Such duties imposed upon the vessel are distinguishable from taxes on the cargo, and are not within the constitutional prohibition that no tax or duty shall be laid on articles exported from any state. Bills of lading, on the other hand, since they represent in commercial usage the goods included therein, are treated as themselves the exports, and cannot be taxed. *Fairbank v. United States*, 181 U. S. 283. Manifests are memoranda of the cargo required by the collector of the port before clearance is given to the outgoing vessel. U. S. Rev. Sts. §§ 4197-4199. Since they in no way represent the cargo, and since they are taxed according to the tonnage of the vessel cleared, the tax thereon seems to be, like a tonnage duty, a tax on an instrument of commerce rather than a tax on exports. For this reason the present decision seems questionable.

CONSTITUTIONAL LAW — POLICE POWER — POWER OF COURT TO REVIEW LEGISLATIVE ACT. — The defendant below was convicted of selling milk from a cow fed on a by-product of brewing called "still-slop," in violation of a statute which prohibited such sale as against public health. He appealed, contending that in the absence of evidence to show that "still-slop" was unhealthy, prohibition of its use was unconstitutional as violating the Fourteenth Amendment. *Held*, that the conviction will be affirmed. *Sanders v. Commonwealth*, 77 S. W. Rep. 358 (Ky.). See NOTES, p. 269.

CONSTITUTIONAL LAW — POLICE POWER — PROTECTION OF PUBLIC TASTE. — A statute gave park commissioners power in their discretion to prohibit the exhibition of advertisements on lands fronting on the public parks, squares, and places of the city of New York. *Seemle*, that the statute is unconstitutional as depriving abutting owners of their property without due process of law. *People v. Green*, 85 N. Y. App. Div. 400. See NOTES, p. 275.

CONSTITUTIONAL LAW — SEPARATION OF POWERS. — A statute provided that if a sentence imposed against the accused by a trial court was excessive the supreme court might reduce it and render such sentence as it considered warranted. *Held*, that the statute is not unconstitutional as permitting an exercise of the pardoning power by the judiciary. *Palmer v. State*, 97 N. W. Rep. 235 (Neb.).

In the earliest cases involving the exercise of the power conferred by such statutes

the courts acted with little or no discussion of the constitutional question involved. See *Fager v. State*, 22 Neb. 332; *United States v. Wynn*, 11 Fed. Rep. 57. Two late cases, on the other hand, refused to interfere with sentences under similar provisions upon the ground that the pardoning power is an exclusive prerogative of the executive branch of the government. *Barney v. State*, 49 Neb. 515; *Fanton v. State*, 50 Neb. 351. The present case, however, overrules them, and reasserts the validity of the statute. This conclusion seems to be sound. The granting of a pardon by the executive does not purport to affect the validity of the judicial proceedings under which the accused is held. On the contrary it admits their legality. *Cook v. Board, etc., of Middlesex*, 26 N. J. Law 326. But a reduction of the sentence by the appellate court for an abuse of discretion by the trial judge attacks the validity of the sentence itself. The accused may demand it as his legal right. See *Anderson v. State*, 26 Neb. 387. It therefore takes effect upon a principle quite different from that on which a pardon is granted.

CONTEMPT—UNFAIR NEWSPAPER PUBLICATION BEFORE SUIT PENDING.—The defendant published a newspaper article tending to prejudice the fair trial of a person who had been accused and arrested but had not yet been committed to the assizes. *Held*, that the defendant may be punished for contempt of court. *Rex v. Parke*, 67 J. P. 421 (Eng., K. B.).

In general the publisher of any article which reflects upon the court or the parties in a pending suit and tends to prejudice the public with respect to the merits of the case, is punishable for contempt of court. *Matter of Sturoc*, 48 N. H. 428; *In re Cheltenham, etc., Co.*, L. R. 8 Eq. 580; see *Regina v. O'Dogherty*, 5 Cox C. C. 348. But in most jurisdictions the defendant is not deemed guilty of contempt if the publication concerns proceedings which have been terminated. *Storey v. People*, 79 Ill. 45. No previous case has been found which has held the defendant guilty where the suit was not yet actually pending. Since, however, the doctrine of the cases is that such publications tend to taint the minds of people who may thereafter be called to act as jurors, and thus to prevent the unprejudiced administration of justice, the decision seems sound.

COPYRIGHTS—LITERARY PROPERTY—COMMON LAW RIGHT AFTER PUBLICATION.—An architect filed plans with the city building department. Afterwards, without his consent, another party used those plans in the construction of a building. *Held*, that the filing of the plans constituted such a publication as to forfeit the architect's exclusive rights. *Wright v. Eisle*, 83 N. Y. Supp. 887. See NOTES, p. 266.

DESCENT AND DISTRIBUTION—RELINQUISHMENT OF EXPECTANT ESTATE BY HEIR.—A father made an advancement of real and personal property to each of his three children, in consideration of which two of them gave him a release under seal of all their claim and interest in any property which he then had or might acquire, and as to which he might die intestate. The father died intestate leaving property. *Held*, that the estate descends equally to each of the three children. *Headrick v. McDowell*, 45 S. E. Rep. 804 (Va.).

The agreements of release, being just as between the parties, should be enforced if the rules of law will allow it. They cannot take effect as releases at law, for the rights to be released were not at the time in existence. CO. LIT. 265. The courts have however generally given effect to the agreements, by holding them to be binding legal contracts not to bring suit against the estate, *Firestone v. Firestone*, 2 Oh. St. 415; or advancements in full barring the heir under the statutes regulating advancements, *Quarles v. Quarles*, 4 Mass. 679; or, where a deed is given, by holding the person giving the deed to be estopped, *Kershaw v. Kershaw*, 102 Ill. 307; or, if a covenant not to claim be given, by holding that the person making the covenant is barred from later making any claim to the estate, on the theory of avoiding circuity of action, *Trull v. Eastman*, 3 Met. (Mass.) 121. The preferable rule seems to be that such releases, though void at law, should be enforced in equity if the intention is clear, consideration is given, and no fraud is involved. *Havens v. Thompson*, 26 N. J. Eq. 383. The contrary decision in the principal case seems to have limited unnecessarily a person's power to make such contracts as he thinks are for his benefit. The argument of the court that the property might be left undisposed of if no heir free to take it could be found, overlooks the fact that in that case it would go to the state.

DIVORCE—ALIMONY.—*Held*, that in an action for divorce and alimony, the court, in determining the amount to be awarded, may take into consideration property which the husband had previously transferred in fraud of creditors. *Dougan v. Dougan*, 97 N. W. Rep. 122 (Minn.).

The conveyance of property by a husband with intent to avoid payment of alimony is within the prohibition of the ordinary statutes against fraudulent conveyances. *Livermore v. Boutelle*, 11 Gray (Mass.) 217. Where, as in the principal case, the conveyance was made in fraud of existing creditors, but without any intention to defraud the wife, the correct rule would seem to be that the conveyance may or may not be set aside by her, according as the jurisdiction is or is not one in which subsequent creditors would be allowed to set it aside. In Minnesota subsequent creditors are not allowed that right. *Fullington v. Northwestern, etc., Ass'n*, 48 Minn. 490. It follows that in that state a decree for alimony should give the wife no power to set aside such a conveyance. Furthermore the husband is certainly powerless to force a reconveyance. *Dunaway v. Robertson*, 95 Ill. 419. Since neither party has any rights in such property, it would seem that the court, in determining the amount of alimony, should have left out of consideration the property thus transferred.

DOWER — REDEMPTION OF MORTGAGED LAND BY EXECUTOR. — A testator purchased an equity of redemption in land subject to deeds of trust, but did not assume to discharge the incumbrances. Under an order of the court to sell the testator's realty, his executor in one transaction sold the land and paid off the incumbrances. *Held*, that the widow of the deceased is entitled to dower in the land. *Casteel v. Potter*, 75 S. W. Rep. 597 (Mo., Sup. Ct.). See NOTES, p. 267.

ELECTION OF REMEDIES — RIGHT OF OBJECTING CREDITOR TO TAKE UNDER FRAUDULENT ASSIGNMENT. — A judgment creditor secured a decree that an assignment for the benefit of creditors was fraudulent and void as to him; but finding it impossible to satisfy his judgment, he claimed the right to take under the assignment. *Held*, that he is entitled to take under the assignment. *Matter of Garver*, 176 N. Y. 386.

The court considers that neither the doctrine of election of remedies nor that of *res judicata* operates to bar the creditor's claim. In most jurisdictions, when once a creditor secures the setting aside of the assignment, he is deemed to have made his election and to be barred from taking under the assignment. *Glenn v. O'Bryan*, 91 Tenn. 106. In New York, however, the contrary rule is well established. *Sternfeld v. Simonson*, 44 Hun (N. Y.) 429; *Mills v. Parkhurst*, 126 N. Y. 89. Accepting the New York view, still it is difficult to see how the court can meet the objection of the dissenting judges that the matter is *res judicata*. A final judgment has been previously rendered by a court of competent jurisdiction on the same issue, namely, the validity of the assignment, between the same parties acting in the same capacity. See *Succession of Durnford*, 1 La. An. 92.

ELECTRIC WIRES — DUTY TO INSULATE AGAINST LIGHTNING. — The defendant, an electric lighting company, allowed the insulation on its wires to become worn where they entered the plaintiff's house. A fire started at that place during a thunderstorm and destroyed the house. In a suit by the plaintiff the trial court instructed the jury that the company was under a duty to insulate its wires against lightning. *Held*, that the instruction is erroneous. *Phanix, etc., Co. v. Bennett*, 74 Pac. Rep. 48 (Ariz.).

By the general rule, an action for negligence cannot be maintained where it was improbable that any damage would result from the defendant's act. Accordingly, a failure to guard against an intervention of natural forces which could not have been reasonably foreseen does not create liability, either because there is no negligence in such a failure, or because it is not regarded as the proximate cause of the damage. *Ward v. Atlantic, etc., Co.*, 71 N. Y. 81; *Denny v. New York Central R. R.*, 13 Gray (Mass.) 481. On the other hand, however violent those forces may be, if past experience has shown them to be probable, they must be guarded against. *Gray v. Harris*, 107 Mass. 492. In determining whether any such occurrence is so unusual that it could not have been reasonably foreseen, the meteorologic conditions of the place must be conclusive. The principal case is the only square decision which has been found on the point whether thunderstorms should be anticipated, and it is contrary to two strong *dicta*. See *Jackson v. Wisconsin Tel. Co.*, 88 Wis. 243; *Southwestern, etc., Co. v. Robinson*, 50 Fed. Rep. 810. Unless climatic conditions in Arizona are very peculiar, it would certainly seem that a thunderstorm which charges a wire with electricity is not such an improbable occurrence that it need not be guarded against.

EMINENT DOMAIN — EASEMENT TO FLOW — RIGHTS OF OWNER OF FEE. — The defendant, a railroad corporation, maintained a pond on the plaintiff's land over which it had obtained an easement by condemnation proceedings to catch and store water for use in operating its engines. The defendant cut and sold the ice which formed on

the pond. The plaintiff claimed a right to use the pond for purposes not incompatible with that for which the land was condemned, and brought action to recover the value of the ice sold. *Held*, that the defendant is entitled to the exclusive use of the pond. *Dillon v. Kansas City, etc., R. R. Co.*, 74 Pac. Rep. 251 (Kan.).

The rights of the owner of an easement are determined by the purpose and character of the easement. The owner of land subjected to an easement has a right to use the land for all purposes not inconsistent therewith. Thus the owner of land over which there is a highway is entitled to the timber that grows on the highway. *Adams v. Emerson*, 6 Pick. (Mass.) 57. In determining the rights of the owner of the fee the same principles apply whether the easement is owned by a railroad or by the public. *Blake v. Rich*, 34 N. H. 282. Likewise, the owner of land subjected to the burden of a mill pond by proceedings under a mill act may use water from the pond for his cattle, for irrigation, or for other purposes, provided he does not thereby appreciably diminish the head of water at the dam. *Paine v. Woods*, 108 Mass. 160. While a railroad company may use trees on its right of way in constructing its road, it may not cut them to sell. *Taylor v. New York, etc., R. R. Co.*, 38 N. J. Law 28. The weight of authority is clearly against the principal case. See *Kansas Central R. R. Co. v. Allen*, 22 Kan. 285.

EVIDENCE — ADMISSIBILITY OF EXPERT TESTIMONY TO PROVE INCAPACITY TO BEAR CHILDREN. — The plaintiff in a deed of trust provided that in the event of his death the defendant should transfer the property covered by the deed absolutely to the plaintiff's wife unless there should be children of their marriage, in which case the defendant should distribute the property between the wife and the children. Subsequently, there being no children, the plaintiff and his wife joined in a bill to have the trust set aside, and medical testimony was offered to prove the wife to be incapable of having issue. *Held*, that the evidence is inadmissible. *Ricards v. Safe Deposit, etc., Co.*, 55 Atl. Rep. 384 (Md.).

The point at issue is believed to be without precedent in America. It would seem, however, that the decision is sound. That a trust may be terminated by agreement of the parties in interest is conceded, but where *cestuis* specified in the deed are unborn the uncertainty of expert evidence renders its reception to affect the devolution of property by cutting off the possible rights of such beneficiaries unsafe. Again, the evidence seems incompetent on grounds of public policy. If in such cases a trust or settlement may be defeated by evidence of inability to bear children due to natural causes, it is difficult to see how, should measures be taken to prevent the possibility of procreation, medical testimony showing the fact could be excluded. It is evident, however, that its admission might tend to encourage a resort, by interested parties, to practices which are manifestly subversive of good morals. The English doctrine seems to accord with that of the principal case. See *In re Dawson*, L. R. 39 Ch. D. 155.

GIFTS — INTER VIVOS — WHAT CONSTITUTES DELIVERY. — A father, having made a positive declaration of a gift of certain money to his daughter, pointed out to her the various places about his farm where the money was buried. The daughter did not remove the money until after the father's death. *Held*, that there is a valid constructive delivery of the gift. *Waite v. Grubbe*, 73 Pac. Rep. 206 (Ore.).

It is generally recognized that delivery is essential to the validity of a parol gift. Constructive delivery is held sufficient under special circumstances, where the nature of the thing itself renders delivery impossible, as is true of a chose in action, or where business custom sanctions constructive delivery, as in case of cattle branded with the donee's brand. *Commonwealth v. Crompton*, 137 Pa. St. 138; *Hillebrant v. Brewer*, 6 Tex. 45. Inasmuch as the formality of delivery is considered necessary to prevent fraud and imposition, constructive delivery, although sometimes extended further, should be limited to these classes of cases. Money is of such a transferable nature that it seems to be improperly treated by the court as an object of constructive delivery. The decision, however, may conceivably be supported on the ground of actual delivery. Actual delivery may be made without manual delivery, as, for example, where articles are of a bulky character. *Fletcher v. Fletcher*, 55 Vt. 325. It is sufficient if the donor gives up, and the donee actually assumes, control of the thing. See *Gammon Theological Seminary v. Robbins*, 128 Ind. 85. Whether in the principal case this was done is a doubtful question of fact.

HUSBAND AND WIFE — COVERTURE — RIGHT OF WIFE TO ACTION FOR ALIENATION OF HUSBAND'S AFFECTIONS. — *Held*, that under a statute giving a married woman living separate from her husband the right to bring suit in her own name to recover damages for injuries done to her person or reputation, a married woman can-

not maintain an action against one who entices away her husband. *Hodge v. Wetaler*, 55 Atl. Rep. 49 (N. J., Sup. Ct.).

By this decision the New Jersey court adopts the view held in Wisconsin and Maine, but not accepted in most jurisdictions, that statutes conferring separate rights upon married women should be construed strictly. See 8 HARV. L. REV. 507; 11 *ibid.* 270; 12 *ibid.* 142; 13 *ibid.* 49.

HUSBAND AND WIFE — LIABILITY OF HUSBAND FOR NECESSARIES AFTER SEPARATION. — After notice from the defendant that he had put away his wife for justifiable cause, the plaintiff rendered her necessary medical services. *Held*, that the plaintiff may recover compensation from the defendant. *Button v. Weaver*, 87 N. Y. App. Div. 224.

It is universally held that a husband is not liable for necessities furnished a wife who has deserted him without sufficient cause. *Monroe County Board of Supervisors v. Buddlong*, 51 Barb. (N. Y.) 493. Generally in the United States the same result is reached where the husband justifiably abandons the wife. *Sawyer v. Richards*, 65 N. H. 185. The doctrine of these cases appears to be that the wife may lose her right to support by her own wrongful act. See *Billing v. Pilcher*, 7 B. Mon. (Ky.) 458. The decision seems to disregard this doctrine and to draw an unwarrantable distinction between the two classes of cases. It may, however, be justified by recent authority in New York and by *dicta* in early English cases. *Hutch v. Leonard*, 165 N. Y. 435; see *Robison v. Gosnold*, 6 Mod. Rep. 171. But the reasoning in later English cases is against it. See *Wilson v. Glossop*, 19 Q. B. D. 379.

INJUNCTION — ENJOINING SOLICITATION OF BREACHES OF CONTRACT. — A competing publisher was soliciting subscribers to the plaintiff's publication to break their contracts of subscription. *Held*, that an injunction against such acts will be issued. *American Law Book Co. v. Edward Thompson Co.*, 84 N. Y. Supp. 225.

Only one other instance in which equity enjoined a person from soliciting the breach of contracts has been found. See *Nashville, etc., R. v. McConnell*, 82 Fed. Rep. 65. Lack of a precise precedent will not, however, prevent the granting of an injunction, if the general principles of equity will warrant its issuance. *Hamilton v. Whitridge*, 11 Md. 128. Speaking generally, equity will enjoin an illegal act if its commission will inflict irreparable injury on the complainant. *Erhardt v. Boaro*, 113 U. S. 537. It is well settled that the acts complained of by the petitioner in the principal case are illegal. *Rice v. Manley*, 66 N. Y. 82. It is clear furthermore that the loss of prestige which would result from the refusal of a large number of customers to abide by their contracts of subscription might easily constitute a permanent injury to the petitioner's business, and a court of equity regards as irreparable an injury which destroys or seriously cripples an established business. *Angier v. Webber*, 96 Mass. 211. Since the same necessity which influences courts of equity to grant relief by injunction in other cases exists in the principal case, the granting of the injunction is a proper exercise of the discretionary powers of the court.

INSURANCE — MARINE INSURANCE — DECK CARGO ON INLAND VOYAGE. — The plaintiffs brought action upon a marine insurance policy to recover the loss they had suffered from the destruction by fire of certain bales of cork carried on the deck of a river steamer. The policy was upon "corks, bottles, and other goods" to be carried up the Rhine. *Held*, that the goods are covered by the policy. *Apollinaris Co. v. Norddeutsche Ins. Co.*, 20 T. L. R. 79 (Eng., K. B.).

It is a general rule that goods carried on deck, unless specifically mentioned, are not covered by a policy on "cargo, property, or goods." *Taunton Copper Co. v. Merchants' Insurance Co.*, 22 Pick. (Mass.) 108. This rule, however, does not apply to goods insured by name which from their nature are usually stowed on deck. Nor does it apply where there is a clear and established usage to carry cargoes like the one insured upon deck, and where it is deemed convenient and prudent to do so. In these cases the underwriter assumes without express provision all the damages and advantages of such usages. *Hazleton v. Manhattan Ins. Co.*, 12 Fed. Rep. 159. The principal case, therefore, in holding that the rule does not apply to an inland voyage by river plainly contemplated by the policy, on which voyage it is the practice and usage to carry cargoes on deck, would seem to be sound.

MINES AND MINERALS — NATURAL GAS — REASONABLE USE. — The defendant desired to injure the plaintiff's gas field, and was accomplishing that purpose by maintaining on neighboring gas land a lampblack factory which wasted enormous quantities of gas without producing a substantial quantity of lampblack. *Held*, that the

running of the factory will be enjoined. *Louisville Gas Co. v. Kentucky Heating Co.*, 77 S. W. Rep. 368 (Ky.).

This case is apparently the first distinctly limiting each surface owner to a reasonable use of the natural gas from a common reservoir. Since damage to a gas field does in fact greatly damage the surface owners, the law should not refuse relief without strong reasons. The reason most urged is that the law as to percolating waters, according to which no surface owner can complain if his neighbor's well draws away the water, furnishes an analogy which should control the law as to gas. *Jones v. Forest Oil Co.*, 194 Pa. St. 379. The difficulties, however, which have prevented the protection of rights in percolating waters do not exist as to gas, since the latter, unlike water, lies so far below the surface, that rights in it can be protected without interference with ordinary use of the land. Furthermore the cause of injury can ordinarily be more satisfactorily determined in the case of gas than in the case of percolating water. Accordingly, rights in gas should be recognized. *Manufacturers Gas Co. v. Indiana Natural Gas Co.*, 155 Ind. 461; *contra*, *Hague v. Wheeler*, 157 Pa. St. 324. The rule of a reasonable use adopted by the court is well adapted to protect the common reservoir.

MUNICIPAL CORPORATIONS — PUBLIC STREETS — PRIVATE RIGHTS ACQUIRED BY EQUITABLE ESTOPPEL. — A village ordinance apparently gave a street railway company the right to build a viaduct 25 feet in width over a portion of a street. The ordinance in fact gave a way only 20 feet wide. The village, by its officers, supervised the construction of the viaduct. Upon demand by the village that the encroachment be removed, the company applied for an injunction restraining the village from interfering with the viaduct. *Held*, that the injunction will be granted. *Village of Winnetka v. Chicago, etc., Ky. Co.*, 68 N. E. Rep. 407 (Ill.). See NOTES, p. 273.

PAROL EVIDENCE RULE — ITS NATURE AND SCOPE. — In an action on a written contract, the defendant, without objection, introduced evidence of a verbal agreement, varying the terms of the writing. The court instructed the jury to disregard this evidence. *Held*, that the parol evidence rule is a rule of substantive law, and that the instruction is therefore proper. *Pitcairn v. Philip Hiss Co.*, 125 Fed. Rep. 110 (C. C. A., Third Circ.).

In an action on a promissory note, the defendant, without objection, introduced parol evidence tending to vary his liability as it appeared on the face of the note. *Held*, that the evidence, having been admitted without objection, is in the record for all purposes. *Union Bank of Brooklyn v. Chase*, 84 N. Y. Supp. 550. See NOTES, p. 271.

PLEADING — EJECTMENT — AVERMENT OF PLAINTIFF'S INTEREST. — The only averment of title in an action of ejectment was an allegation of a relationship of landlord and tenant existing between the plaintiff and the defendant. After a verdict for the plaintiff the defendant moved in arrest of judgment that the declaration was insufficient. *Held*, that the declaration alleges a sufficient title in the plaintiff. *Ayotte v. Johnson*, 56 Atl. Rep. 110 (R. I.).

The principal case appears squarely to raise the question whether a declaration merely setting forth the lease is a sufficient averment of present interest in the premises to permit a landlord to maintain an action of ejectment. Such a declaration sufficiently alleges title in the lessor at the time of leasing, since the lessee is estopped to deny its validity at that time. *Rector v. Gibbon*, 111 U. S. 276. Hence it would appear to set forth a *prima facie* case of present title, since a state of things once shown to exist is presumed to continue. *Rowland v. Updike*, 28 N. J. Law 101. It follows that a tenant wishing to defend on the ground of a subsequent termination of his lessor's interest must allege this as new matter by an affirmative plea. Accordingly the decision appears sound on principle, although no authority directly in point has been found. Cf. WILLISTON'S STEPHEN ON PLEADING, p. 363. The decision is even more clearly correct if the averments in the declaration are to be construed as allegations of a present relationship of landlord and tenant.

RAILROADS — RIGHT TO DEMURRAGE. — The plaintiff allowed a car to remain unloaded for an unreasonable length of time after notification of its arrival. The defendant now claimed a lien on the goods for demurrage in accordance with its regulations. *Held*, that the lien exists. *Schumacher v. Chicago, etc., R. R. Co.*, 108 Ill. App. 520.

The Illinois courts have heretofore held in accordance with the Nebraska courts that the right to demurrage attached only to carriers by water. *Chicago, etc., R. R. Co.*

v. Jenkins, 103 Ill. 588; *Burlington, etc., R. R. Co. v. Chicago Lumber Co.*, 15 Neb. 390. The principal case, therefore, is of interest in that it brings Illinois into line with the weight of authority. *Kentucky Wagon Co. v. Ohio, etc., R. R. Co.*, 32 S. W. Rep. 595 (Ky.). The decision appears to be sound on principle also, since there seems to be no argument in favor of allowing demurrage to carriers by water which does not apply with equal or greater force to carriers by land.

RECEIVERS — LIABILITY TO SUIT. — In an action against certain associations in the hands of receivers, the plaintiffs failed to allege that permission to sue the receivers had been obtained from the court appointing them. *Held*, that this is an essential allegation. *Manker v. Phenix, etc., Ass'n*, 96 N. W. Rep. 982 (Ia.).

Heretofore the Iowa courts have held that one might maintain an action in any court against a receiver appointed by another court without first obtaining the permission of the latter, although the appointing court would have authority under these circumstances to interfere by injunction at any time for the protection of its receiver. *Allen v. Central R. R. Co.*, 42 Ia. 683. The principal case is of interest in that it overrules these earlier decisions and brings the Iowa law into line with the weight of authority. *Porter v. Sabin*, 149 U. S. 473. It is also another illustration of the extent to which the courts will go in order to protect receivers. See 17 HARV. L. REV. 196.

SURETYSHIP — SURETY'S RIGHT OF SUBROGATION. — A surety company which was surety for one of several joint tort-feasors paid a judgment recovered in tort against them. *Held*, that the surety is entitled to be subrogated to the judgment creditor's rights. *Kolb v. National Surety Company*, 176 N. Y. 233. See NOTES, p. 276.

TAXATION — PURCHASE OF NON-TAXABLE BONDS TO AVOID TAXATION. — A statute provided that personal property should be listed for taxation with reference to the quantity held on a certain day. The defendant bank, for the purpose of avoiding taxation, purchased United States bonds immediately before, and sold them immediately after, the date fixed by the statute. *Held*, that the defendant may be assessed with the money invested in the bonds. *In re People's Bank of Vermont, Ill.*, 67 N. E. Rep. 777 (Ill.).

Any person has a legal right to purchase bonds, even though his purpose be to avoid taxation. *Stilwell v. Corwin*, 55 Ind. 433. Equity will not enjoin the collection of a tax levied upon money so invested. *Mitchell v. Board of Commissioners of Leavenworth Co., etc.*, 91 U. S. 206. What authority has been found supports the principal case. *Holly Springs, etc., Co. v. Supervisors of Marshall Co.*, 52 Miss. 281. On principle, however, the result seems indefensible. Equity may, indeed, well refuse to enjoin the collection of the tax because the defendant is not deserving of its assistance in his sharp practice. But at law, since the defendant had a legal right to purchase the bonds, there was no fraud of which a court could take cognizance. The result is that either the defendant has been assessed with property which on taxing day was another's, or the tax has been levied as a penalty, neither of which is provided for by the statute. It is, therefore, for the legislature, rather than for the courts, so to extend the law as to prevent similar transactions. A provision against the evasion of taxation in this manner appears in an Ohio statute. See *Shotwell v. Moore*, 129 U. S. 590.

TORTS — LIABILITY OF NEGLIGENT MAKER OR VENDOR OF CHATTEL. — The defendant company sold a defectively constructed land-roller, which was resold to the plaintiff. Owing to the defect, the plaintiff was injured. *Held*, that the defendant is not liable. *Kuelling v. Roderick Lean Mfg. Co.*, 84 N. Y. Supp. 622.

The defendant sold diseased hogs. These were resold to the plaintiff, who placed them with his own. The plaintiff's hogs died of the disease. *Held*, that the defendant is liable. *Skinn v. Reutter*, 97 N. W. Rep. 152 (Mich.). See NOTES, p. 274.

TRADE UNIONS — JUSTIFICATION FOR INJURY INTENTIONALLY DONE TO EMPLOYER'S BUSINESS. — The plaintiff having refused to sign a contract with its employees not to continue the "piece work system" in its factory, the defendant union caused a strike, and stationed men near the factory who persuaded many of the non-union men still working for the plaintiff to leave. *Held*, that an injunction restraining the defendant from interfering with the plaintiff's business will not be vacated, on the ground that the object of the interference was not to increase the employee's wages, but to restrict the plaintiff's freedom of carrying on his business. *Davis Machine Co. v. Robinson*, 41 N. Y. Misc. 329.

The intentional infliction of injury by one person on the business of another should be considered *prima facie* actionable unless there is justification. The struggle for existence called competition in trade is a justification; and so also should be the struggle for existence between employers and employees. See 15 HARV. L. REV. 482. In the principal case a distinction was drawn between competition as to the price of labor, which the court intimates would justify the injury done, and competition as to the conditions of labor, which they say does not justify the injury. But success by the employee in competition as to the conditions under which his labor shall be performed may be just as important to the employee, and no more harmful to the employer, than success in the competition as to the price of labor. The decision of the court overlooks the consideration that the right of the employee to improve the conditions of labor is as great as that of the employer to dictate how his business shall be conducted.

WATERS AND WATERCOURSES — EROSION — RIGHT OF RIPARIAN OWNER TO RECLAIM LAND. — The defendant, an owner of land which had been gradually encroached upon by a river, built a wall where his bank originally stood. This flooded a mill owned by the plaintiff, who brought suit to compel removal. *Held*, that the wall is an unlawful obstruction, and must be removed. *Holcomb v. Blair*, 76 S.W. Rep. 843 (Ky.).

Only two other decisions have been found concerning the right of a riparian owner to reclaim land lost through erosion. One of these holds that he may build out to his original line, even if it injures the other owners. *Gulf, Col. etc., R. Co. v. Clark*, 101 Fed. Rep. 678. This liberal interpretation of his rights corresponds to some extent to those decisions which allow a riparian owner to guard against future erosion even at the expense of other proprietors. *Shelbyville, etc., Turnpike Co. v. Green*, 99 Ind. 205. The other case, decided in Scotland, accords with the principal case in denying any right to reclaim eroded land. *Aberdeen v. Menzies*, cited in *Withers v. Purchase*, 60 L. T. R. 819, 821. This would probably be the law also in those jurisdictions which do not allow protection even against future erosion if it will flood the land of others. *Gerrish v. Clough*, 48 N. H. 9. Logically the principal case seems unassailable. Restoring the old bank, and so changing the middle line of the stream, deprives the opposite owner, by means of an artificial erection, of property made his by accretion. Since title by accretion is perfect, such an act is equally unlawful whether the channel has recently changed or not. *Menzies v. Breadalbane*, 3 Bli. N. S. 414.

WITNESSES — RELIGIOUS BELIEF AS AFFECTING CREDIBILITY. — A statute provided that no witness should be deemed incompetent on account of his religious belief. A witness having testified that he had no fixed belief in a Supreme Being or in a future state of rewards and penalties, the court charged that his statements might be considered as affecting his credibility. *Held*, that the charge is erroneous. *Brink v. Stratton*, 176 N. Y. 150.

The imprecation of divine vengeance alone was originally thought to give the oath its binding effect upon the conscience, from which it followed logically enough that want of belief in the Supreme Being rendered a witness incompetent to testify. *Curtiss v. Strong*, 4 Day (Conn.) 51. With the diminishing force of the reason of the rule, however, the rule itself has been modified, until by statute in a large number of states there are to-day no religious qualifications of competency, although in several of them, by statute or judicial decision, want of faith may still be shown to affect credibility. *State v. Elliot*, 45 Ia. 486; *Hunscom v. Hunscom*, 15 Mass. 184. Since the effect of an oath on an "unbeliever," while not necessarily weaker than that on a "believer," must nevertheless be different from it, it would seem to follow that unbelief may properly be shown for that purpose. The principal case is believed to be the first actual decision to reach an opposite conclusion. In thus annihilating the old common law distinction, it in effect overrules the previously accepted doctrine in New York. *Starbro v. Hopkins*, 28 Barb. (N. Y.) 265; see *People v. M'Garren*, 17 Wend. (N. Y.) 460.